Supreme Court, U.S.
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No. 04-1546

In The

Supreme Court of the United States

MITCHELL BOSCH,

Petitioner,

vs.

CITY OF BISMARCK,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of North Dakota

PETITION FOR WRIT OF CERTIORARI

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May 17, 2005

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QUESTION PRESENTED

Does the Sixth Amendment require the right to confrontation of all evidence the jury could have reasonably used to find guilt beyond a reasonable doubt?

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OPINION BELOW

The opinion of the Supreme Court of North Dakota is reported at 2005 ND 12, 691 N.W.2d 260, and reprinted in the Appendix at App. 1.

JURISDICTION

The judgment of the Supreme Court of North Dakota was entered on January 19, 2005 (App. 16). A timely petition for rehearing was denied on February 16, 2005 (App. 17-18). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

Code of Ordinances, Bismarck, North Dakota, § 12-10-01, provides in relevant part:

> 1. A person may not drive . . . any vehicle upon a highway or upon public or private areas

to which the public has a right of access for vehicular use in this state if any of the following apply:

a. That person has an alcohol concentration of an amount as set out in NDCC Section 39-08-01 at the time of the performance of a chemical test within two hours of driving;

b. That person is under the influence of intoxicating liquor . . .

2. A person who violates any provision of this section is guilty of an offense. Sentence for a violation of this section shall be as provided by N.D.C.C. Section 39-08-01.

North Dakota Century Code § 39-08-01 provides in relevant part:

1. A person may not drive . . . any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if any of the following apply:

a. That person has an alcohol concentration of at least eight one-hundredths of one percent by weight at the time of the performance of a chemical test within two hours after the driving . . . of a vehicle. . .

North Dakota Century Code § 39-20-07 provides in relevant part:

Interpretation of chemical tests. Upon the trial of any . . . criminal action or proceeding arising out of acts alleged to have been committed by any person while driving . . . a motor vehicle while under the influence of intoxicating

liquor, . . . evidence of the amount of alcohol . . . in the person's blood at the time of the act alleged as shown by a chemical analysis of the . . . breath . . . is admissible. For the purpose of this section:

. . .

3. A person having an alcohol concentration of at least eight one-hundredths of one percent by weight . . . at the time of the performance of a chemical test within two hours after driving . . . a vehicle is under the influence of intoxicating liquor at the time of driving . . . a vehicle.

4. Alcohol concentration is based upon . . . grams of alcohol per two hundred ten liters of alveolar air . . .

5. The results of the chemical analysis must be received in evidence when it is shown that the sample was properly obtained and the test was fairly administered, and if the test is shown to have been performed according to methods and with devices approved by the state toxicologist, and by an individual possessing a certificate of qualification to administer the test issued by the state toxicologist. The state toxicologist is authorized to approve satisfactory devices and methods of chemical analysis and determine the qualifications of individuals to conduct such analysis, and shall issue a certificate to all qualified operators who exhibit the certificate upon demand of the person requested to take the chemical test.

6. The state toxicologist may appoint, train, certify, and supervise field inspectors

> of breath testing equipment and its operation, and the inspectors shall report the findings of any inspection to the state toxicologist for appropriate action. Upon approval of the methods or devices, or both, required to perform the tests and the persons qualified to administer them, the state toxicologist shall prepare and file written record of the approval with the director and recorder in each county, unless the board of county commissioners designates a different official, and shall include in the record:
>
> . . .
>
> c. The operational checklist and forms prescribing the methods currently approved by the state toxicologist in using the devices during the administration of the tests.
>
> . . .

STATEMENT OF THE CASE

In this criminal case, the North Dakota Supreme Court concluded that petitioner Bosch's Confrontation Clause argument directed at certain evidence was "irrelevant", even though the Court acknowledged that had Bosch countered the evidence this may have affected the weight given to the evidence by the jury (App. 10-11, at ¶¶ 12-13). Bosch contends that with this simple stroke of the pen, the North Dakota Supreme Court took away his Sixth Amendment right of confrontation, and infringed upon the Fourteenth Amendment requirement that the

State prove every element of a criminal offense beyond a reasonable doubt.

Bosch was charged by an Officer of the City of Bismarck with violating the City's ordinance against driving under the influence of alcohol, Code of Ordinances, Bismarck, North Dakota, § 12-10-01. More specifically, Bosch was charged with driving a vehicle on a public roadway while under the influence of intoxicating liquor or with an alcohol concentration of .08% or above. (App. 12). Bosch pled not guilty, and a jury trial was had (App. 2, at ¶ 3).

On the night of Bosch's arrest, "[h]e was taken to the Bismarck Police Department, where he consented to an Intoxilyzer test. The test indicated Bosch's blood alcohol level was .15 percent." (App. 2, at ¶ 2; 19-20). The Intoxilyzer test includes a "standard solution" portion of the test, and in this case a Standard Solution No. 496 was used (App. 19). The State Toxicologist's Standard Solution Analytical Report for Standard Solution No. 496, which in the trial of this case was the City's Plaintiff's Exhibit 4, stated in relevant part, "Each bottle of solution may be used on up to 50 Intoxilyzer 5000 tests or forty-five (45) days, whichever comes first." (App. 21-24).

"At the trial, Bismarck police officer, Allen Nass, [was called as a witness for the prosecution and] testified that he was in charge of the standard solution used for Bosch's Intoxilyzer test." (App. 2, at ¶ 3). Direct examination of Officer Nass included this exchange:

> Q. [T]he police department keeps a record of the tests that are conducted on each standard solution?
>
> A. Correct.

Q. And you have that in front of you?

A. Yes, I do.

Q. And you're able to look at that document and determine how many tests were run on this specific standard solution?

A. Yes, I am.

MR. HOFFMAN: Judge, for the record, this is my objection.

THE COURT: Okay.

(App. 2-3, at ¶ 3). The document to which Officer Nass referred was a completed Form 120-I from the State Toxicologist entitled, "Intoxilyzer Record". The document itself was never offered into evidence by the prosecution, but was included in the record for record purposes as Court Exhibit 1. (App. 25).

"In chambers counsel [for Bosch] explained his objection:

> [M]y objection goes to Form 120-I, in that it contains information which would be hearsay and which Mr. Bosch does not have the ability to cross-examine or to confront witnesses.
>
> The items specifically filled in by Bismarck police officers who do these tests, they are done independent of Officer Nass, so he did testify that he was not directly involved in these tests and was not present when the tests were conducted. And, therefore, I submit that all the information contained on Form 120-I would be, like I said, hearsay, no ability to cross-examine. Officer Nass was not involved in any of that information.
>
> . . . .

> It is offered to prove the truth of the matter asserted, because they are trying to prove that Plaintiff's Exhibit 4, the foundational document for the Standard Solution 496 is met. And so we're being given information that we have no ability to test. I mean, for example, there could have been tests run that weren't written down. There might have been – there is no way for us to test that information. It's presented to us like out of the blue, and we can't test it. So it is hearsay. It is offered to prove the truth of the matter asserted, and we don't have the right or the ability to cross-examine it. It's just there. And that's the objection.

"The trial court overruled Bosch's objection, and Nass testified that the standard solution had been used for 25 tests prior to its use for Bosch's Intoxilyzer test. The jury found Bosch guilty and he appealed." (App. 3-4, at ¶ 3; 13-15).

"On appeal, Bosch assert[ed] the trial court abused its discretion in admitting the Intoxilyzer test results over Bosch's 'foundation, hearsay and confrontation objections'. . . : "

> Plaintiff's Exhibit 4, the Standard Solution Analytical Report (Solution No. 496), states in relevant part, "Each bottle of solution may be used on up to 50 Intoxilyzer 5000 tests or forty-five (45) days, which ever comes first." It is Bosch's contention that this foundational requirement of Plaintiff's Exhibit 4 was not adequately and properly shown, and, therefore, foundation for Plaintiff's Exhibit 5, the test result, was lacking.

> [O]ver Bosch's hearsay and confrontation objections, Nass was allowed to testify he looked at the document, counted the number of tests run on Standard Solution No. 496, and there were only 25 tests by the time of Bosch's test. . . .
>
> Plaintiff's Exhibit 4 was also filed . . . and clearly appears to be a method approved by the state toxicologist under NDCC 39-20-07(5) and (6)(c). Therefore, the requirement of Plaintiff's Exhibit 4 that "Each bottle of solution may be used on up to 50 Intoxilyzer 5000 tests" must scrupulously be met unless the state toxicologist testifies at the trial. Here, the state toxicologist did not so testify.

(App. 4-5, at ¶ 4). See N.D.C.C. § 39-20-07(5) and (6).

The North Dakota Supreme Court concluded, as a matter of state law in interpreting N.D.C.C. § 39-20-07(5) and (6), (App. 5-10, at ¶¶ 5-11), that "the analytical report and the directive therein that a standard solution may be used for up to 50 tests is not a part of the approved method and proof of that fact is not a prerequisite to showing fair administration of the test or to admission of the test results." (App. 10, at ¶ 11). This conclusion is not questioned in this petition.

However, the North Dakota Supreme Court went on to state:

> We conclude the prosecution in this case established a prima facie foundation for admission of the breathalyzer test results. Evidence that more than 50 tests were conducted with the standard solution used for Bosch's test, if it exists, may constitute evidence discrediting the test results, thereby affecting the weight to be given

> to those results, but not their admissibility. [Citation omitted]. We hold, therefore, the district court did not abuse its discretion in admitting the test results.

(App. 10, at ¶ 12). And then the Court concluded:

> Bosch argues that his constitutional right of confrontation was violated when Officer Nass testified to the number of uses of the standard solution which were conducted by other persons, not Officer Nass, and those persons were neither available nor required to testify. Having determined that the number of tests conducted with the standard solution is not a foundational requirement for showing fair administration of the test for purposes of admitting the test results, we further conclude Bosch's Confrontation Clause argument is irrelevant.

(App. 10-11, at ¶ 13). Bosch's Confrontation Clause argument on appeal to the North Dakota Supreme Court is reprinted in the Appendix at App. 26-27.

The North Dakota Supreme Court affirmed Bosch's judgment of conviction (App. 11, at ¶14). Bosch timely filed a petition for rehearing with the North Dakota Supreme Court, arguing again his constitutional right of confrontation and, given the Court's acknowledgment of Bosch's ability to counter the challenged evidence and thereby affect the weight to be given the evidence by the jury, tying the Confrontation Clause argument to his constitutional right to be free from conviction except on proof beyond a reasonable doubt (App. 28-31). That petition was denied without opinion (App. 17-18).

REASONS FOR GRANTING THE WRIT

The problem in this case is the North Dakota Supreme Court ruled that Bosch's Confrontation Clause argument about Officer Nass' testimony of less than 50 tests was irrelevant; yet, the jury could have reasonably used that testimony, in conjunction with Plaintiff's Exhibit 4 (App. 23), to find beyond a reasonable doubt the test results of .15 percent. It is reasonable to so conclude because the North Dakota Supreme Court also acknowledged that if Bosch had evidence of more than 50 tests, this "may constitute evidence discrediting the test results, thereby affecting the weight to be given those results". The prosecution was not required to put on Officer Nass' testimony, as the Court ultimately ruled; but the prosecution did affirmatively elicit the testimony and it is reasonable to conclude the jury used that testimony in reaching a verdict of guilty.

In *Crawford v. Washington*, 541 U.S. ___, 124 S.Ct. 1354 (2004), this Court wrote:

> The Sixth Amendment's Confrontation Clause provides, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." We have held that this bedrock procedural guarantee applies to both federal and state prosecutions.

The Court went on to instruct, "The text of the Confrontation Clause . . . applies to 'witnesses' against the accused – in other words, those who 'bear testimony.' . . . 'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.*

In regard to testimony or "testimonial", the Court explained, "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id.* The Court had no problem finding the statements in that case, a product of police interrogation, to be testimonial, and their admission to be a violation of the Sixth Amendment without the opportunity for confrontation and cross-examination. The Court, however, left "for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.*

The case at bar does not involve prior testimony at a preliminary hearing, before a grand jury, or at a former trial; or police interrogation. Was the information imparted by Officer Nass from Court Exhibit 1 (App. 25) testimonial? Bosch believes it was.

The State Toxicologist who prepared the Form 120-I, and the police who filled it out, each did so knowing their statements "were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial". See *Crawford v. Washington*, *supra*, citing Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 3; *City of Las Vegas v. Walsh*, 91 P.3d 591 (Nev. 2004) (health professional's affidavit, prepared solely for the prosecution's use at trial, and offered to prove the element of alcohol concentration, violated the Sixth Amendment without the right of confrontation). In the case at bar, the information imparted by Officer Nass from Court Exhibit 1 was offered to prove the element of alcohol

concentration; and, more importantly, to do so beyond a reasonable doubt.

Bosch believes, under the circumstances of this case, that Officer Nass' evidence was "testimonial" under a due process standard in that a jury could have reasonably used his evidence to find guilt beyond a reasonable doubt. North Carolina got it right all those years ago when it wrote, "[I]t is a rule of the common law, founded on natural justice, that no man *shall be prejudiced by evidence* which he had not the liberty to cross examine." See *Crawford v. Washington*, *supra*, citing *State v. Webb*, 2 N.C. 103, 104 (1794) (emphasis added). The prejudice is the freedom from conviction except upon competent evidence rising to the level of beyond a reasonable doubt.

In *Sandstrom v. Montana*, 442 U.S. 510 (1979), the question presented was whether a jury instruction involving a presumption violated the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt. The Court framed the test in these terms: "[W]hether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." *Id.* at 514. The Court concluded in that case, "It is clear that a reasonable juror could easily have viewed such instruction as" violative of the constitution. *Id.* at 515.

In *Cage v. Louisiana*, 498 U.S. 39 (1990), the Court, in construing the constitutionality of a reasonable doubt instruction, stated, "[W]e consider how reasonable jurors could have understood the charge as a whole." *Id.* at 41. The Court concluded, in overturning the instruction, "[I]t becomes clear that a reasonable juror could have interpreted

the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Id.* The Court had stated earlier in its opinion, "In state criminal trials, the Due Process Clause of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 39, citing *In re Winship*, 397 U.S. 358, 364 (1970), and *Jackson v. Virginia*, 443 U.S. 307, 315-316 (1979). Significantly, for purposes of the case at bar, the Court continued:

> This reasonable doubt standard "plays a vital role in the American scheme of criminal procedure." *Winship*, 397 U.S., at 363. Among other things, "[i]t is a prime instrument for reducing the risk of convictions resting on factual error." *Ibid.*

498 U.S. at 39-40. Bosch contends the Sixth Amendment right of confrontation is also a prime instrument for reducing the risk of convictions resting on factual error. Bosch believes in this case that his Sixth Amendment right of confrontation and his Fourteenth Amendment right of due process are interrelated.

In the above cases involving reasonable doubt, the test was how a reasonable juror would have viewed the instruction. Bosch believes that test translates to this case. Here, Bosch believes the jury could have reasonably used the evidence elicited from Officer Nass to find guilt beyond a reasonable doubt. If there is any question whether the evidence elicited from Officer Nass is "testimonial" for Confrontation Clause purposes, then that question is decided by looking at Bosch's Due Process guarantees under the Fourteenth Amendment. Therefore, the question in this case is whether the Sixth Amendment requires the

right to confrontation of all evidence the jury could have reasonably used to find guilt beyond a reasonable doubt. Bosch contends this is an important question of federal law which should be decided by this Court.

Included with that question are these two questions:

1. If a fact is necessary to the prosecution's case, then do both the Sixth Amendment and due process require the right of confrontation of any evidence offered to prove that fact?

2. Is any evidence offered to meet the burden of proof beyond a reasonable doubt testimonial?

CONCLUSION

Petitioner Bosch requests this Court to grant this petition for a writ of certiorari and reverse the decision of the North Dakota Supreme Court that his Confrontation Clause argument is irrelevant.

Respectfully submitted,

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Filed 1/19/05 by Clerk of Supreme Court

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2005 ND 12

City of Bismarck, Plaintiff and Appellee

v.

Mitchell Bosch, Defendant and Appellant

No. 20040157

Appeal from the District Court of Burleigh County, South Central Judicial District, the Honorable Burt L. Riskedahl, Judge.

AFFIRMED.

Opinion of the Court by VandeWalle, Chief Justice.

Paul H. Fraase (on brief), Assistant City Attorney, P.O. Box 5503, Bismarck, N.D. 58506-5503, for plaintiff and appellee.

Michael Ray Hoffman, P.O. Box 1056, Bismarck, N.D. 58502-1056, for defendant and appellant.

City of Bismarck v. Bosch

No. 20040157

VandeWalle, Chief Justice.

[¶1] Mitchell David Bosch appealed from a conviction entered upon a jury verdict finding him guilty of driving under the influence of alcohol. We hold the trial court did not abuse its discretion in admitting the test results of an Intoxilyzer test, and we affirm.

I

[¶2] On November 26, 2003, Bosch was arrested for driving under the influence of alcohol. He was taken to the Bismarck Police Department, where he consented to an Intoxilyzer test. The test indicated Bosch's blood alcohol level was .15 percent.

[¶3] Bosch was charged with DUI. He pled not guilty and a jury trial was held on May 13, 2004. At the trial, Bismarck police officer, Allen Nass, testified that he was in charge of the standard solution used for Bosch's Intoxilyzer test. A directive by the State Toxicologist advised that a standard test solution "may be used on up to 50 Intoxilyzer 5000 tests." Bosch's attorney object to testimony by Nass about the number of tests conducted with the standard solution:

> Q. [T]he police department keeps a record of the tests that are conducted on each standard solution?
>
> A. Correct.
>
> Q. And you have that in front of you?
>
> A. Yes, I do.

Q. And you're able to look at that document and determine how many tests were run on this specific standard solution?

A. Yes, I am.

MR. HOFFMAN: Judge, for the record, this is my objection.

THE COURT: Okay.

In chambers counsel explained his objection:

> [M]y objection goes to Form 120-I, in that it contains information which would be hearsay and which Mr. Bosch does not have the ability to cross-examine or to confront witnesses.
>
> The items specifically filled in by Bismarck police officers who do these tests, they are done independent of Officer Nass, so he did testify that he was not directly involved in these tests and was not present when the tests were conducted. And, therefore, I submit that all the information contained on Form 120-I would be, like I said, hearsay, no ability to cross-examine. Officer Nass was not involved in any of that information.
>
> . . . .
>
> It is offered to prove the truth of the matter asserted, because they are trying to prove that Plaintiff's Exhibit 4, the foundational document for the Standard Solution 496 is met. And so we're being given information that we have no ability to test. I mean, for example, there could have been tests run that weren't written down. There might have been – there is no way for us to test that information. It's presented to us like out of the blue, and we can't test it. So it is hearsay.

> It is offered to prove the truth of the matter asserted, and we don't have the right or the ability to cross-examine it. It's just there. And that's the objection.

The trial court overruled Bosch's objection, and Nass testified that the standard solution had been used for 25 tests prior to its use for Bosch's Intoxilyzer test. The jury found Bosch guilty and he appealed.

II

[¶4] On appeal, Bosch asserts the trial court abused its discretion in admitting the Intoxilyzer test results over Bosch's "foundation, hearsay and confrontation objections." In his appellate brief, Bosch explains the nature of his objections:

> Plaintiff's Exhibit 4, the Standard Solution Analytical Report (Solution No. 496), states in relevant part, "Each bottle of solution may be used on up to 50 Intoxilyzer 5000 tests or forty-five (45) days, which ever comes first." It is Bosch's contention that this foundational requirement of Plaintiff's Exhibit 4 was not adequately and properly shown, and, therefore, foundation for Plaintiff's Exhibit 5, the test result, was lacking.
>
> [O]ver Bosch's hearsay and confrontation objections, Nass was allowed to testify he looked at the document, counted the number of tests run on Standard Solution No. 496, and there were only 25 tests by the time of Bosch's test. . . .
>
> Plaintiff's Exhibit 4 was also filed . . . and clearly appears to be a method approved by the state toxicologist under NDCC 39-20-07(5) and (6)(c).

> Therefore, the requirement of Plaintiff's Exhibit 4 that "Each bottle of solution may be used on up to 50 Intoxilyzer 5000 tests" must scrupulously be met unless the state toxicologist testifies at the trial. Here, the state toxicologist did not so testify.

[¶5] Evidence of the amount of alcohol, drugs, or a combination thereof, in a person's blood as shown by a chemical analysis of the blood, breath, saliva, or urine is admissible under N.D.C.C. § 39-20-07, which provides, in relevant part:

> 5. The results of the chemical analysis must be received in evidence when it is shown that the sample was properly obtained and the test was fairly administered, and if the test is shown to have been performed according to methods and with devices approved by the state toxicologist, and by an individual possessing a certificate of qualification to administer the test issued by the state toxicologist. . . .
>
> 6. . . . . Upon approval of the methods or devices, or both, required to perform the tests and the persons qualified to administer them, the state toxicologist shall prepare and file written record of the approval with the director and the recorder in each county, unless the board of county commissioners designates a different official, and shall include in the record:
>
> a. An annual register of the specific testing devices currently approved, including serial number, location, and the date and results of last inspection.

b. An annual register of currently qualified and certified operators of the devices, stating the date of certification and its expiration.

c. The operational checklist and forms prescribing the methods currently approved by the state toxicologist in using the devices during the administration of the tests.

The material filed under this section may be supplemented when the state toxicologist determines it to be necessary, and any supplemental material has the same force and effect as the material that it supplements.

[¶6] Under N.D.C.C. § 39-20-07(5), the results of chemical analysis to determine blood alcohol content must be received in evidence if the test sample was properly obtained, and the test was fairly administered and shown to have been performed in accordance with methods and devices approved by the State Toxicologist. *Henderson v. Director, N.D. Dep't of Transp.*, 2002 ND 44, ¶ 16, 640 N.W.2d 714. Absent testimony by the State Toxicologist, a foundational requirement necessary to show fair administration of a breathalyzer test and admissibility of the test results is a showing that the test was administered in accordance with the approved methods filed with the clerk of the district court. *Ringsaker v. Director, N.D. Dep't of Transp.*, 1999 ND 127, ¶ 8, 596 N.W.2d 328.[1] The purpose

[1] Under N.D.C.C. § 39-20-07(6) the State Toxicologist must file the "written record of the approval" with "the recorder in each county, unless the board of county commissioners designates a different official." Here, the State Toxicologist filed all documents with the

(Continued on following page)

of N.D.C.C. § 39-20-07 is to ease the requirements for the admissibility of chemical test results while assuring that the test upon which the results are based is fairly administered. *Lee v. North Dakota Dep't of Transp.*, 2004 ND 7, ¶ 10, 673 N.W.2d 245. Whether an Intoxilyzer test has been properly administered can be determined by proving that the method approved by the State Toxicologist has been scrupulously followed. *Johnson v. North Dakota Dep't of Transp.*, 2004 ND 59, ¶ 12, 676 N.W.2d 807. However, scrupulous compliance does not mean hypertechnical compliance. *Id.*

[¶7] The State Toxicologist filed with the state's attorney the list of certified chemical test operators, the list of approved chemical testing devices, and the approved method to conduct breath tests with the Intoxilyzer 5000 KB-EP, which was used to conduct Bosch's breathalyzer test. These documents were admitted into evidence without objection by Bosch. The State Toxicologist also filed with the state's attorney a standard solution analytical report stating that the standard solution used for Bosch's test was in the required concentration and was approved for use in testing. In that report, the State Toxicologist instructed "[e]ach bottle of solution may be used on up to 50 Intoxilyzer 5000 tests or forty-five (45) days, which ever comes first." Bosch's objection to the trial court's admission of the Intoxilyzer test results is that the State failed to provide adequate proof that the standard solution used for Bosch's test had not been used more than 50 times. Although Officer Nass testified that the standard solution had only been used 25 times, Bosch objects that Nass did

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Burleigh County State's Attorney, who was designated by the board of county commissioners to receive and hold the documents.

not have personal knowledge of each test conducted with the standard solution and, therefore, could not offer credible evidence that the standard solution had only been used that many times. Bosch asserts that without adequate proof of this fact, the State has failed to prove fair administration of the test, and the trial court, therefore, abused its discretion in admitting the test results.

[¶8] But, there is nothing in N.D.C.C. § 39-20-07 which requires, for fair administration of a breath test, that a test solution cannot be used for more than 50 tests, unless that requirement is made a part of the approved method for conducting tests. The approved method, filed by the State Toxicologist, sets forth with specificity the requirements for insuring that a test is conducted fairly and accurately. There is no requirement in the State Toxicologist's approved method for conducting breathalyzer tests which requires the standard solution not be used more than 50 times. The approved method requires running a test sequence that includes a "standard solution test" to insure that the standard solution is within the required concentration for accurate testing. The standard solution used for Bosch's test fell within the accepted parameters of the standard solution test. Bosch does not argue the solution was defective or not within acceptable concentration levels. There is no reference within the approved method limiting the number of tests that can be conducted with a standard solution or indicating that using a solution in excess of 50 tests affects the scientific accuracy of the test results.

[¶9] The approved method states "[w]hen the test is conducted according to this method, it is considered as fairly administered and the result obtained is scientifically accepted as accurate." The State Toxicologist filed a

standard solution analytical report verifying the standard solution used for Bosch's test was quantitatively tested and met the required concentration for accurate testing. There is nothing in the statute or the State Toxicologist's approved method limiting the number of tests per bottle of solution as a prerequisite to fair administration of the test. We will not infer from the advisory statement in the analytical report that using a standard solution for no more than 50 tests is a necessary part of the approved method for proving fair administration of a test. For a process to be a necessary part of the approved method, the State Toxicologist must expressly include it in the approved methodology and make it a part of the requirement for fair administration. The State Toxicologist has not expressly made the "up to 50 tests" directive a part of the approved method, and we will not infer that it is a requirement for fair administration of a test.

[¶10] Although we understand the confusion created by the State Toxicologist's filing, and the prosecution's introduction into evidence, of a document entitled "analytical report" and containing a statement such as the one at issue here, the term "approved method" has become a word of art. *See, e.g., Johnson*, 2004 ND 29, ¶ 11, 676 N.W.2d 807; *Lee*, 2004 ND 7, ¶ 11, 673 N.W.2d 245; *Moser v. North Dakota State Highway Comm'r*, 369 N.W.2d 650, 653 (N.D. 1985); *State v. Schneider*, 270 N.W.2d 787, 791 (N.D. 1978). As such, it refers to the document filed by the State Toxicologist under N.D.C.C. § 39-20-07(5) and (6) showing the "operational checklist and forms prescribing the methods currently approved by the State Toxicologist in using the devices during the administration of the tests."

[¶11] Under N.D.C.C. § 39-20-07(6), the State Toxicologist may supplement material filed under that section, including the register of approved testing devices, the register of qualified certified operators, and the operational checklist and forms. The supplemental materials have the "same force and effect as the material that it supplements." Unless, however, the State Toxicologist includes in the approved method which is filed with the appropriate entity a specific reference to a supplemental filing, stating that it is a required part of the approved method for fair administration of a test, we will not infer that a filed document is part of the foundational requirement for proving fair administration. Consequently, we conclude the analytical report and the directive therein that a standard solution may be used for up to 50 tests is not a part of the approved method and proof of that fact is not a prerequisite to showing fair administration of the test or to admission of the test results.

[¶12] We conclude the prosecution in this case established a prima facie foundation for admission of the breathalyzer test results. Evidence that more than 50 tests were conducted with the standard solution used for Bosch's test, if it exists, may constitute evidence discrediting the test results, thereby affecting the weight to be given to those results, but not their admissibility. *See State v. Zimmerman*, 516 N.W.2d 638, 642 (N.D. 1994). We hold, therefore, the district court did not abuse its discretion in admitting the test results.

III

[¶13] Bosch argues that his constitutional right of confrontation was violated when Officer Nass testified to

the number of uses of the standard solution which were conducted by other persons, not Officer Nass, and those persons were neither available nor required to testify. Having determined that the number of tests conducted with the standard solution is not a foundational requirement for showing fair administration of the test for purposes of admitting the test results, we further conclude Bosch's Confrontation Clause argument is irrelevant.

[¶14] The judgment of conviction is affirmed.

[¶15] Gerald W. VandeWalle, C.J.
Dale V. Sandstrom
William A. Neumann
Mary Muehlen Maring
Carol Ronning Kapsner

State of North Dakota
County of Burleigh) SS In Municipal Court
City of Bismarck) Before Hon. Wm. Severum

County No. 08 City No. 003

03-17273
№ 4347472

The undersigned, sworn, and says:

Div. 4 | Violation Date 12-10-03 | Time (24 Hr.) 0054 | Day of Wk. Wed | Issuance Date | Time (24 Hr.) | 1 | 2 | 3

Defendant

State ND | Class D | DLN / Alpha / SSN 501-06-0747 | DOB (M-D-Y) 9-30-82 | Age 21 | Race W | Sex M | Ht. 6-08 | Wt. 165 | Hair | Eyes | Build | Other

Last Name Bosch | First Mitchell | Middle David | ☐ Operator ☐ Passenger ☐ Pedestrian ☐ Other

Street Address 308 Kedtord blvd. | City Bismarck | State ND | Zip 58504 | Phone 400-9850

Veh

N/A ☐ | Lic. Plate No. HBF219 | St. ND | Yr. Reg. 03 | Color(s) Veh blue | Yr. 86 | Make Ford | Model Tempo | ICC / PSC / DOT No. | Commercial Vehicle Type NC

Did unlawfully operate a motor vehicle upon a public highway and did then and there commit the following offense:

Info. Chg./Ref.

Charge / Offense / NDCC: DUT - drove a Vehicle on a Public Roadway While Under the influence of an intoxicating beverage or Gas of 08% or More. | Speed | Zone

BOND / STATUTORY FEE $ MUST APPEAR

Car / AC / Radar | ☐ Sta. ☐ Mov. | 4

Alcohol / Drug Test | Refuse ☐ | Blood ☐ | Breath ☐ | Other | Result %

Highway No. 1005 2nd St | Beg. / Dec. Milepost/Node | N E S W | City Bismarck | NDCC / Ord 12-10-01 | CFR Code

All in violation of ND Century Code and against the peace and dignity of the state of North Dakota.

Claimed Cond.

1 Highway type ☐ Slippery Surface ☐ Other Traffic | 5 Area ☐ Visibility ☐ Type Crash

Offense committed materially to crash? ☐ Yes ☐ No

Dir. of Travel N E S W | Other | Crash No. 710 | Officer's Agency 133

(Issuing Officer's)

Court Disposition

Ck. if you ☐ DUI ☐ Counsel Waived ☐ Req. by Counsel

Sentence Plead: Not Guilty, 12-2-03 | Ck. if Bond Forfeited ☐ | Fine

Court: Arrest: 2-2-04 at 10:30 Am | Costs

☐ DDC | Other

NDCC / Ord | Conviction Date | ☐ See Rev.

The State of North Dakota to the above named defendant:

COURT DATE: You are summoned to appear at the time and place designated below to answer to the charge made against you. If you fail to appear or post bond, a warrant will be issued for your arrest.

Judge Signature

Day of Wk. Mon | Date (M-D-Y) 1-12-04 | Time 9 ☐ a.m. ☐ p.m. | 5

Address 514 E. Thayer | City Bismarck

PROMISE TO APPEAR I consent and promise to appear at the time and place specified in the above summons. The receipt of a copy of which is acknowledged, and I expressly waive earlier hearing. X

Sworn to and subscribed before me

Date Issued | Complainant / Officer | Prosecutor | 6

Judge | Served by | Date | 7

SFN 5775 (Rev. 8-99)

COURT COPY

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH
~~STATE OF NORTH DAKOTA~~
City of Bismarck

IN DISTRICT COURT
SOUTH CENTRAL
JUDICIAL DISTRICT
Case # 04-5-0003

-vs-

Mitchell Bosch

ORDER

On 5/13/04, the defendant (☒ appeared ☐ did not appear) before the Court on the offense of Driving Under the Influence and; ☒ i defendant (☐ entered a plea of guilty ☒ was found guilty) ☐ ii after trial, the defendant was found NOT GUILTY; ☐ iii after review, the defendant is found to be in violation of the Court's Order of _____;

IT IS ORDERED:

☐ A The matter is dismissed. ☐ B A judgement of acquittal is entered.

☐ C Imposition of the sentence is deferred, and 61 days after probation ends (if all conditions are met) the guilty plea is withdrawn, the case dismissed, and the file sealed.

☒ D Judgement of guilty is entered, and defendant is sentenced for a period of 15 days to the ☒ County Detention Center/Jail ☐ Department of Corrections ☐ Other ____ with all suspended for 18 months on conditions.

☐ E Defendant shall pay a fine in the amount of $275, through the Clerk of District Court, with $___ suspended on conditions.

☒ F Defendant must pay the mandatory court administrative fee, through the Clerk of District Court: $125 for Class B Misdemeanor; $200 for Class A

Misdemeanor; $400 for Class C Felony; $650 for Class B Felony; $900 for a Class A or AA Felony ☐ waived $_____.

☒ G Defendant must pay the mandatory $100 indigent defense/court facility improvement fee ☐ waived $_____.

☒ H Defendant must pay the $25 indigent defense application fee ☒ does not apply ☐ waived $_____.

☐ I Defendant shall pay a crime victim witness program fee in the amount of $_____.

☐ J All fines and fees shall be paid beginning May 30 at a rate of $100.00 per month.

☐ K Other _____.

CONDITIONS

☐ 1 The defendant shall report to the Sheriff to begin sentence on _____ at _____ o'clock _____.m.

☐ 2 The defendant's imprisonment shall
☐ be served on weekends
☐ work release privileges if approved by Sheriff
☐ be served at the _____, with arrangements to be made with personnel at the facility.
☐ be with credit for time served (___ _____ days).

☐ 3 The defendant shall make restitution in the sum of $_____ to be paid by certified check or money order ☐ directly to victim and file proof of payment by _____; or through the ☐ Clerk of District Court ☐ County State's Attorney beginning _____ at the rate of $_____ per month.

☒ 4 The defendant shall complete a chemical dependency evaluation by a certified addiction counselor, and file proof with the Court by 6/13/04 ☐ Follow

through with any recommended treatment by ____ and file proof with the court by _____.

☐ 5 The defendant is placed on probation for a period of 18 and shall not violate this Order or any municipal, state, or federal laws and such probation is: ☒ unsupervised ☐ supervised and subject to the additional conditions set forth by the Court. ☐ supervision suspended for a period of _____. Failure will result in additional conditions set in Appendix A.

☐ 6 The defendant shall complete _____ hours of ☐ community service by _____: ☐ attend ACT class by _____; ☐ submit to fingerprinting.

☐ 7 Other: _____

☒ 8 Any violations of this Order may result in a revocation or termination of probation, and the imposition of any suspended sentence or penalty.

Date: May 13, 2004 District Judge: /s/ Burt L. Riskedahl

Counsel for ~~State~~ City: Mr. Fraase

Counsel for Defendant: Mr. Hoffman

Waived Counsel: ☐ Yes

I understand the conditions of this sentence and I acknowledge that I have received a copy of this Order. If my address changes before completion of any of the conditions, it is my responsibility to provide the Court and the State's Attorney with my new address.

Defendant's Signature /s/ Mitchell Bosch

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

JUDGMENT
Supreme Court No. 20040157

Appeal from the district court for Burleigh County.

City of Bismarck, **Plaintiff and Appellee**

v.

Mitchell Bosch, **Defendant and Appellant**

This appeal having been heard by the Court at the November 2004 Term before:

Chief Justice Gerald W. VandeWalle, Justice William A. Neumann, Justice Dale V. Sandstrom, Justice Mary Muehlen Maring, and Justice Carol Ronning Kapsner;

and the Court having considered the appeal, it is ORDERED AND ADJUDGED that the judgment of conviction is AFFIRMED.

This judgment, together with the opinion of the Court filed this date, constitutes the mandate of the Supreme Court.

Dated: January 19, 2005.

By the Court:

/s/ Gerald W. VandeWalle
Chief Justice

ATTEST:

/s/ Penny Miller
Clerk

seal

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ORDER ON PETITION FOR REHEARING

Supreme Court No. 20040157

Appeal from the District Court for Burleigh County.

City of Bismarck, **Plaintiff and Appellee**

v.

Mitchell Bosch, **Defendant and Appellant**

This appeal having been heard by the Court at the November 2004 Term and an opinion having been filed on January 19, 2005, by:

Chief Justice Gerald W. VandeWalle, Justice William A. Neumann, Justice Dale V. Sandstrom, Justice Mary Muehlen Maring and Justice Carol Ronning Kapsner;

and a petition for rehearing having been filed by Michael R. Hoffman, counsel for the Appellant Mitchell Bosch, and the Court having considered the matter, it is hereby ORDERED AND ADJUDGED, that the petition be and is hereby **DENIED**.

AND IT IS FURTHER ORDERED, that this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the judgment of this Court.

Dated: February 16, 2005

By the Court:

/s/ Gerald W. VandeWalle
Chief Justice
North Dakota Supreme Court

Attest: /s/ Penny Miller
Clerk of the Supreme Court

Seal

Intoxilyzer Test Record and Checklist
State Toxicologist Bismarck, ND 58501

CMI INC
INTOXILYZER – ALCOHOL ANALYZER
ND MODEL 5000 SN 68-012127
11/26/2003 11/01

	TEST	AC	TIME
01	DIAGNOSTIC OK	45±5	DEG C
02	ROOM AIR	.000	01:48 CST
03	SUBJECT TEST 1	.169	01:48 CST
04	ROOM AIR	.000	01:50 CST
05	STD. SOL.	.112	01:51 CST
06	ROOM AIR	.000	01:52 CST
07	SUBJECT TEST 2	.157	01:53 CST
08	ROOM AIR	.000	01:54 CST
09	REPORTED AC	.15	01:53 CST
	DIFFERENCE OK		
	NO RFI DETECTED		
10	SIM TEMP = 34.0	LOCATION=BSPD	

SUB NAME = BOSCH, MITCHELL D
SUB DOB = 09/30/82
SUB SEX = MALE WEIGHT = 165
TEST = DUI CIT = 4347472
DR. LIC. = ND/501060747
SIMUL SER NO = DR3452
STD SOL NO = 496
COUNTY = 08 OPER NO = 069807

20 minute waiting period ascertained? Y
A clean mouthpiece was used for and disposed of after the first subject test? Y
Standard Solution test completed? Y

I followed the approved method and the instructions displayed by the intoxilyzer in conducting this test.

OPERATOR'S SIGNATURE /s/ [Illegible] 7191

Remarks: 03-17273

State of North Dakota)
) ss
County of Burleigh)

(Filed July 12, 2004)

I, Margaret A. Pearson, do hereby certify that I am a duly-appointed State Toxicologist for the State of North Dakota and an official custodian of the records and files of the office thereof, that I have carefully compared the ***Standard Solution Analytical Report (Solution No. 496)*** hereto attached with the respective original as the same appears of record on file at the Office of Attorney General, Crime Laboratory Division, in the County of Burleigh, North Dakota, and find the same to be a true and correct copy thereof and of the whole thereof. In witness whereof I have set my hand at the city of Bismarck, in said county this 30th day of October, 2003.

/s/ Margaret A. Pearson
Margaret A. Pearson,
State Toxicologist

State of North Dakota)
) ss
County of Burleigh)

On this 30th day of October, 2003 before me personally appeared Margaret A. Pearson, known to me to be a State Toxicologist for the State of North Dakota, acknowledged to me that she has executed the same.

Subscribed to and sworn before me this 30th day of October, 2003.

/s/ Cindy Leingang
Cindy Leingang, Notary
Public, State of North Dakota
My Commission Expires
January 11, 2005

[SEAL] OFFICE OF ATTORNEY GENERAL
Crime Laboratory Division

[Address And Phone Numbers Omitted In Printing]

Standard Solution Analytical Report

Standard Ethyl Alcohol Solution No. **496** Date Approved 30 October 2003

The solution was tested quantitatively by gas chromatography and Intoxilyzer 5000 analysis.

A proper result for the standard test using this solution should be in the range of 0.100% to 0.119% blood alcohol, (g/100 ml of blood or g/210 L of alveolar air).

The Intoxilyzer will print out the value of the standard test in 3 digits on Intoxilyzer Test Records (Form 106-KB or Form 106-KB-EP).

Having found the ethyl alcohol in the required concentration to simulate the equivalent of 0.11% blood alcohol at 34.0±0.2°C, I the undersigned hereby approve the standard ethyl alcohol solution for use as a standard solution in breath testing.

The number of bottles sent to each location will be based on their need. Consequently, it is possible some locations may use the solution with a certain batch number for longer than a month or two, while other locations may use standard solutions from different batches in the same month. Each bottle of solution may be used on up to 50 Intoxilyzer 5000 tests or forty-five (45) days, whichever comes first.

/s/ Margaret A. Pearson
Margaret A. Pearson,
State Toxicologist

Form 112
Toxicology Laboratory
Crime Laboratory Division

PETITIONER'S EXHIBIT
Court 1
DF 5/13/04

03-17273

NORTH DAKOTA DEPARTMENT OF HEALTH
OFFICE OF THE STATE TOXICOLOGIST
P.O. BOX 937 - BISMARCK, ND 58502-0937

INTOXILYZER RECORD

Location: BSPD

Standard Solution No.: 796

Intoxilyzer Serial No.: 68-012127

Test #1 0.117 % #2 0.116 % #3 0.116

Simulator Serial No.: OR 3452

Operator: Allen Nace

Date: 11/6/03

Date	Operator's Name	Subject's Name	Subj. Test 1	Std. Test	Subj. Test 2
11-7-03	Smith	Wells, Graham M.	Refused	.113	Refused
11-08-03	Wegener, Charles E.	Stewart, Robin M.	.201	.116	.199
11-08-03	Wegener, Charles E.	Hamerel, Jeffrey B.	.125	.114	.125
11-11-03	Brocker, John C.	Gustafson, John E.	.265	.115	.262
11-11-03	Stein, Jerry R.	Nicholas, Hunter A.	Refused	.114	Refused
11-11-03	Anderson, Brett M.	Young, Kathleen M.	Def. Samp.	.113	.302
11-12-03	Brocker John C	Perry, Jameson D.	.155	.114	.158
11-14-03	Brocker John C	Bashaw Shara Leeann	.091	.115	.088
11-15-03	C. Maier	Simmons, Jared Lee	.147	.114	.152
11-15-03	C. Maier	Hare, Brian James	.163	.113	.176
11-15-03	J Stein	Miller, Brian Lee	.205	.112	.202
11-16-03	D Bozovsky	Barron, Melissa R.	.138	.115	.139
11-16-03	Zachmeier, Andy	McDonald, Jason	.116	.114	.115
11-16-03	Brocker, John C.	Asbridge, Tate M.	.291	.113	.275
11-18-03	Shuglmeyer Jason	Bonfa J Brink	.247	.113	.255
11-20-03	Rudolph, Michael S	Arnoldi, Amy	.198	.113	.189
11-20-03	Rudolph, Michael S	Seelee, Joshua	.123	.112	.119
11-21-03	Stein, Jerry	Koch, Justeen	.160	.113	.156
11-23-03	Meyer, Scott	McCallum, Dennis L.	Def Sam .173	.113	.150
11-23-03	K Shuglmeyer, Jason	Kathenbrock, Patrick	.334	.112	.333
11-24-03	Seidel	Markle, Scott A.	.153	.114	.153
11-24-03	Seidel	Monroe, Dusty	Refused	RECEIVED & FILED	Refused
11-25-03	Huber	Nagurski Kathleen .021	.323	MAY 14 2004	.312
11-25-03	Huber	Nagurski Kathleen .032	.293	.112	.315
11/26/03	Huber	Bosch, Mitchell	.169	Clk. of Crt. Burleigh Co. .112	.157

App. 25

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

City of Bismarck,

Plaintiff/Appellee,

v.

Supreme Court No.
20040157

Mitchell David Bosch,

Defendant/Appellant.

BRIEF OF APPELLANT

Appeal from Criminal Judgment

Burleigh County District Court
South Central Judicial District

MICHAEL R. HOFFMAN
Attorney for Appellant
P.O. Box 1056
Bismarck, ND 58502-1056
(701) 355-0900
N.D. State Bar ID 04366

* * *

IV. Confrontation

Crawford v. Washington, ___ U.S. ___, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), has changed the map of criminal law. Now, where testimonial evidence is at issue, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. Here, the question becomes whether

the evidence is testimonial, because there was no showing of unavailability or a prior opportunity for cross-examination.

Crawford states that the Confrontation Clause "applies to 'witnesses' against the accused – in other words, those who 'bear testimony.' . . . 'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purposes of establishing or proving some fact.'" Here, the information contained in court's Exhibit 1, was made for the purpose of establishing or proving a fact against Bosch, that being the required foundation for complying with Plaintiff's Exhibit 4.

In *City of Las Vegas v. Walsh*, 91 P.3d 591 (Nev. 2004), the Supreme Court of Nevada held that a health professional's affidavit (similar to the statement provided for in NDCC 39-20-07(10)) was testimonial, and in that case violated the defendant's rights under the Sixth Amendment's Confrontation Clause.

Here, the imparting of the information contained in Court's Exhibit 1 to the injury, under the circumstances of this case, violated Bosch's rights under the Sixth Amendment's Confrontation Clause.

* * *

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

City of Bismarck,

Plaintiff/Appellee,

v.

Supreme Court No.
20040157

Mitchell David Bosch,

Defendant/Appellant.

PETITION FOR REHEARING

Appeal from Criminal Judgment

Burleigh County District Court
South Central Judicial District

MICHAEL R. HOFFMAN
Attorney for Appellant
P.O. Box 1056
Bismarck, ND 58502-1056
(701) 355-0900
N.D. State Bar ID 04366

* * *

This petition for rehearing does not contest the Court's conclusion that "the analytical report and the directive therein that a standard solution may be used for up to 50 tests is not a part of the approved method and proof of that fact is not a prerequisite to showing fair administration of the test or to admission of the test

results." Opinion, ¶ 11. Bosch recognizes the Court's conclusion as a matter of state law.

This petition for rehearing instead focuses on the court's statement. "Evidence that more than 50 tests were conducted with the standard solution used for Bosch's test, if it exists, may constitute evidence discrediting the test results, thereby affecting the weight to be given to those results, but not their admissibility." Opinion, ¶ 12. Given the court's conclusion in ¶ 11, Bosch agrees with this statement in ¶ 12 regarding the weight to be given the results, and sees three scenarios resulting from the statement.

The first scenario is where the defense puts on evidence of more than 50 tests, either through cross-examination or direct testimony. This is the most obvious and direct scenario given the statement in ¶ 12. In closing argument, the defense would argue the directive of the State Toxicologist in the Standard Solution Analytical Report and the defense evidence of more than 50 tests. The jury would then decide the weight of the test results in the context of the prosecution's complete burden of proof beyond a reasonable doubt.

The second scenario is where neither the prosecution nor the defense put on evidence of the number of tests. Under the scenario, the prosecution would put in evidence all of the necessary documents filed by the State Toxicologist including the Standard Solution Analytical Report, but would not put on any evidence of the actual number of tests in the case. The defense would or could not cross-examine on the subject, and would not have any affirmative evidence by way of direct examination. In closing argument, however, the

defense could still validly argue the prosecution did not meet its complete burden of proof beyond a reasonable doubt by its failure to put in any evidence regarding the actual number of tests in the case. A jury could find a defendant not guilty on this basis. The defense argument would be a lack of evidence argument, and it would go to the weight of the evidence in the context of the prosecution's complete burden of proof beyond a reasonable doubt.

The final scenario, which is this case, is where the prosecution in fact offers evidence of 50 tests or less to bolster the directive of the State Toxicologist in the Standard Solution Analytical Report. The prosecution need not offer such evidence under the court's ruling in this case, but once it does the evidence needs to be competent. Here, the evidence was not competent. It was hearsay and it violated Bosch's federal constitutional right of confrontation. Also, by allowing this incompetent evidence, the district court violated Bosch's constitutional right to argue lack of evidence and to be free from conviction except on proof beyond a reasonable doubt only upon competent evidence. Further, under the Court's statement in ¶ 12, the district court's admission of this incompetent evidence worked to be burden shifting, forcing Bosch to produce evidence to counter the incompetent evidence. Contrary to the Court's final conclusion in this case, Opinion, ¶ 13, Bosch's Confrontation Clause argument is not irrelevant.

Rule 103(a), NDREv, provides, in relevant part, "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected". Here, the admission of the prosecution's evidence of 50 tests or less affected Bosch's

substantial rights, those being his federal rights under the Confrontation Clause and his federal right to be convicted only when the prosecution has met its complete burden of proof beyond a reasonable doubt.

Respectfully submitted this ___ day of January 2005.

MICHAEL R. HOFFMAN
North Dakota Bar ID 04366
P.O. Box 1056
120 N. 3rd St., Ste. 100
Bismarck, ND 52502-1056
355-0900

Michael R. Hoffman